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No. 00-1875

IN THE
Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,
Petitioners,

v.

SIX FLAGS OVER GEORGIA LLC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Petition showed that, in this case involving punitive damages of more than a quarter billion dollars (almost $340 million with interest by now), two questions independently merit plenary review and, at a minimum, one question requires a GVR in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001). Respondents do not seriously quarrel with the merits of petitioners' arguments. Instead, they stand on a single procedural objection: that petitioners did not adequately preserve their arguments below. Respondents advanced that same objection — using the same overheated rhetoric — when they unsuccessfully opposed petitioners' request for a stay. It was rejected then, and it should be rejected now.

1. The Petition demonstrated that, as so many other state appellate courts have done, the Georgia Court of Appeals in this case simply ignored *BMW*'s third guidepost, which requires a comparison to "the civil or criminal penalties that

could be imposed for comparable misconduct." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996). Thus, the Petition showed, this case provides an opportunity to halt a widespread and disturbing trend in state courts to ignore a crucial component of the *BMW* inquiry. *See* Pet. 12-15. Respondents now present three meritless objections.

First, respondents claim that petitioners failed adequately to preserve their claim. *See* Br. in Opp. 24-25. This is so, they suggest, because petitioners "included only two sentences alleging any due process violations," *id.* at 7, and cited *BMW* without making specific reference to the third guidepost, *id.* at 24. But respondents cannot, and do not, deny that petitioners expressly asked the Court of Appeals to review the trial court's *BMW* determination. *See* Br. in Opp. App. 17a, 19a. Because the third guidepost is an inherent part of *BMW* review, that alone would have been enough.[1] And, even though exacting page limitations forced petitioners to compress their discussion of the numerous issues arising from a six-week trial, their opening and reply briefs each devoted multiple pages to *BMW*-related punitive damages issues.[2] Among other things, petitioners pointed out that there is more

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[1] *See, e.g., Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) ("'Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'").

[2] Respondents reduce this to "two sentences" (Br. in Opp. 7) by crediting only sentences accompanied by express citation of federal authority. Because state-law limitations run parallel to the *BMW* restrictions, that is wrong. Indeed, respondents apply a double standard: in describing the opinion below, they apparently count as *BMW* discussion all passages addressing punitive damages issues (state law or otherwise) as well as any discussion of facts that (in their view) supported the imposition of punitive damages. *See id.* at 8 ("Nearly half of the court's opinion set forth and explained the predicates for the first *BMW* guidepost — the reprehensibility of Petitioners' conduct.").

to *BMW* review than the second ("ratio") guidepost,[3] and expressly challenged the award as disproportionate compared to penalties imposed elsewhere.[4]

Second, respondents offer that the third-guidepost issue "may not be certworthy." Br. in Opp. 24. This is so, they suggest, because the issue has been raised previously in a petition (filed by another party) that this Court denied. *See id.* at 24 n.22.[5] But a denial of certiorari does not "have any precedential effect," *Hopfman v. Connolly*, 471 U.S. 459, 461 (1985) (*per curiam*), and, if anything, the previous filing shows that the issue is recurrent. Moreover, respondents nowhere deny the issue's broad significance. Nor could they: juries' continued tendency to impose outsized punitive damages awards has a profoundly debilitating effect on the administration of civil justice in this Nation. As this case illustrates, *BMW*'s first two guideposts are insufficient to halt this tendency; only meaningful enforcement of the third guidepost can provide an absolute and objective anchor to reality. *See Cooper*, 121 S. Ct. at 1689.

Finally, respondents argue that, because petitioners' conduct amounted to "theft" punishable by imprisonment, the third guidepost has no restraining force in this case. *See* Br.

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[3] Br. in Opp. App. 19a ("[A] quarter of a *billion* dollars in punitives is excessive regardless of the 'ratio' to compensatory damages.").

[4] *Compare* Br. in Opp. App. 16a ("This award is over *30* times larger than the largest punitive damages award ever paid in this state — the $8 million award where plaintiff's decedent was engulfed in a ball of fire caused by the defendant's knowing design of an automobile with an unsafe fuel system.") *with BMW*, 517 U.S. at 575 (third guidepost involves comparison to "the civil penalties authorized or imposed in comparable cases").

[5] Respondents also point out that the Court denied certiorari in three other cases cited in the Petition. *See* Br. in Opp. 24 & n.22. But, in those cases, the petitions did not present the question presented here.

in Opp. 25-27. That, frankly, is absurd; the instances of "theft" to which respondents point involved complex accounting disputes concerning the realization of income. If the third guidepost were so malleable as to allow petitioners' conduct to be analogized to theft, it would be devoid of any practical effect. Besides, the jury verdict in this case precludes respondents' theft analogy: although the complaint included a count for conversion, the jury found against respondents on that count. *See* Pet. App. 2a n.2.[6]

2. "Elementary notions of fairness enshrined in [this Court's] constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. Petitioners did not receive such notice. In light of the text and purpose of the partnership agreement, petitioners' executives acted reasonably in believing that their conduct, far from being unlawful, was expressly permitted. *See* Pet. 17. Moreover, because the Georgia courts had never before recognized a cause of action for aiding and abetting the breach of a fiduciary duty, the corporate-parent petitioners — against whom the overwhelming share of punitive damages was awarded even though they owed respondents no fiduciary duty — had no reason to expect that they might be held liable. *See* Pet. 17-18. The approach of the Georgia courts — permitting the imposition of punitive damages where a defendant's conduct does not violate clearly established legal duties —

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[6] Respondents try to soften the impact of this fact by implying that, despite evidence that would have supported a conversion verdict, they *asked* the jury to find against them on that count. *See* Br. in Opp. 26 n.25. In fact, respondents submitted merely that, while the jury could hold petitioners liable on multiple theories, it should not award damages for the same injuries twice. *See* 12/17/98 Tr. at 187-88.

conflicts with that of numerous other courts. *See* Pet. 18-21. Indeed, respondents do not argue otherwise.

Instead, respondents again argue that the issue was not preserved, again on the theory that petitioners' arguments below were "inadequate to constitute the proper presentation of any federal constitutional concerns they might have had about notice." Br. in Opp. 27. That objection again fails: petitioners unquestionably invoked *BMW*, and a central source of *BMW*'s holding is the Due Process Clause's notice requirement. *See supra*, p.4. Respondents also claim that petitioners waived their argument by submitting a proposed jury instruction on aiding and abetting. *See* Br. in Opp. 28. Even ignoring that this point covers only one-half of the notice problem in this case (notice that aiding-and-abetting liability might be imposed — not notice that an open-ended duty to maximize investment might be held to be consistent with the partnership agreement), it is wrong. Petitioners' consistent position at trial was that, as a matter of law, the corporate-parent petitioners could not be held liable for breach of fiduciary duty. *See* R. 577-81, 588-93, 16297-300, 16542-45. Petitioners can hardly be faulted for submitting a proposed instruction after the trial court rejected that position. Moreover, after the Court of Appeals created a new cause of action for aiding and abetting the breach of a fiduciary duty, petitioners protested at the first opportunity, in their petition for review in the Georgia Supreme Court (at 25-26).[7]

Next, respondents claim that, on the merits, they have the better argument. *See* Br. in Opp. 28-30. That is beside the

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[7] Respondents also rely (at 28) on the Court of Appeals' suggestion that petitioners failed to list the issue in their enumerations of error. That suggestion is simply puzzling. *See* Appellants' Enumeration of Errors No. 3 ("The trial court erred by failing to grant judgment in favor of the Non-Partner Defendants, which owed no fiduciary duty to Plaintiffs.").

point at the certiorari stage. Regardless, it is wrong. Insofar as respondents argue that pre-existing Georgia law *did* establish a cause of action for aiding and abetting a breach of a fiduciary duty, *see id.* at 29, they are at odds with the court below, which acknowledged that Georgia courts had "never explicitly recognized a cause of action for aiding and abetting a breach of fiduciary duty," Pet. App. 13a. Although the Court of Appeals suggested that prior cases may have "implicitly acknowledged that such claims are viable" (*id.*), that is hardly enough to establish the point with the clarity needed to justify a punitive award in excess of a quarter billion dollars.[8] Insofar as respondents argue that the court interpreted the partnership agreement to require petitioners "to act 'in good faith as to the amount and type of capital improvements,'" Br. in Opp. 28 (quoting Pet. App. 16a), they miss the point entirely. The question here is not whether respondents' interpretation of the contract prevailed below — it is whether petitioners violated legal duties that were so clearly established as to render punitive damages appropriate.

3. The Petition explained that, even if the Court declines to grant plenary review on the issues discussed above, it should at least GVR in light of *Cooper*. *See* Pet. 22-24. That is so because, whereas the court below applied an exceedingly deferential standard of review to the trial court's *BMW* determination, this Court held in *Cooper* that *BMW*

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[8] *Cf. Lambrix v. Singletary*, 520 U.S. 518, 530 (1997) ("tentative expression" in prior opinion is not enough for *Teague* purposes). This is particularly so because, as the Court of Appeals acknowledged, *see* Pet. App. 13a, the Eleventh Circuit, hearing an appeal in a diversity case at roughly the time of petitioners' conduct, "decline[d] to extend aider and abettor liability to breaches of fiduciary duty concluding that Georgia courts would not recognize such a cause of action." *Munford v. Valuation Research Corp. (In re Munford, Inc.)*, 98 F.3d 604, 613 (11th Cir. 1996) (*per curiam*), *cert. denied*, 522 U.S. 1068 (1998).

determinations must be reviewed *de novo*. *See id.* Once again, respondents argue only that petitioners failed to preserve the issue, this time for three reasons. But respondents offer no convincing reason why the Court of Appeals should be deprived of an opportunity to reassess its judgment in light of the intervening authority.[9]

First, respondents argue that, to preserve the *Cooper* issue, it was incumbent upon petitioners to argue with great specificity that appellate courts are required to review *BMW* determinations *de novo*. *See* Br. in Opp. 15-20. But respondents do not deny that petitioners properly asked the Court of Appeals to review the trial court's *BMW* determination. *See supra*, p.2. That request necessarily encompassed a request that the Court of Appeals do so under

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[9] Respondents imply that this Court applies a more petitioner-friendly standard in connection with a stay than in connection with a GVR. *See* Br. in Opp. 2. The contrary is true. *See Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (*per curiam*) ("the standard that we apply in deciding whether to GVR is somewhat more liberal than the All Writs Act standard"); *see also Tyler v. Cain*, 121 S. Ct. 2478, 2484 n.6 (2001) (GVR is "not a final determination on the merits") (internal quotation marks omitted); *Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) (GVR appropriate where state-court decisions "are ambiguous as to whether they rest on state-law or federal-law grounds"); *Zant v. Moore*, 489 U.S. 836 (1989) (*per curiam*) (GVRing despite waiver claims). Moreover, if, as respondents claim (at 2, 12-13), petitioners' supposed waivers deprive this Court of jurisdiction, that would have been equally true in the stay context. Respondents err in relying on instances in which this Court denied certiorari after it had granted a stay. *See id.* at 2 n.2. Respondents overlook that, in each of those instances, the Court had granted a stay to allow the case to be "held" for a case already set for argument, and that the Court denied certiorari only when the case set for argument was resolved in a way unfavorable to the petitioner in the held case. That plainly is not so here.

the proper standard of review.[10] Moreover, petitioners urged that "[t]h[e] [Court of Appeals] reviews *de novo* rulings on questions of law," Br. in Opp. App. 16a, and *Cooper* itself teaches that a *BMW* determination is reviewed as a question of law.[11] In any event, the Court of Appeals passed on the standard of review, *see* Pet. 22, which by itself is sufficient to preserve the issue.[12]

Second, respondents argue that petitioners forfeited their *Cooper* argument when they appealed to the Court of Appeals instead of directly to the Georgia Supreme Court. *See* Br. in Opp. 20-22. This is so, respondents contend, because, while Georgia procedure mandates that "[a]ll cases involving the

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[10] *See, e.g., Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 381 (1995) ("a *prior* question" is necessarily preserved); *Missouri v. Jenkins*, 515 U.S. 70, 145 (1995) (Souter, J., dissenting) ("we have held that an issue is fairly comprehended in a question presented when the issue must be resolved in order to answer the question"); *United States Nat'l Bank of Ore. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) (Court will not hold waived "an issue antecedent to . . . the dispute before it, even an issue the parties fail to identify and brief") (internal quotation marks omitted); *Illinois v. Gates*, 462 U.S. 213, 220 (1983) (no waiver where question is "so connected with [the question raised] in substance as to form but another ground or reason for alleging the invalidity of the . . . judgment") (internal quotation marks omitted).

[11] *Cooper* also shows that respondents' waiver argument is wrong. In *Cooper*, too, the respondent argued that the petitioner had "never specifically identified for the [court below] the appropriate appellate standard of review for due process considerations." *Cooper* Br. in Opp. 7. The respondent pointed out that, other than including a blanket statement specifying the standard of review concerning "the erroneous award of punitive damages" (which the petitioner was challenging on state as well as federal grounds), the petitioner's brief did not argue that, or explain why, federal law required *BMW* determinations to be reviewed *de novo*. *See id.* at 7-8. This Court nevertheless granted the petition.

[12] *See, e.g., Lebron*, 513 U.S. at 379; *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991).

construction of . . . the Constitution . . . of the United States and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn into question" be appealed to the state *Supreme Court*, petitioner appealed to the Court of Appeals even though their *Cooper* claim "would require a determination that the U.S. Constitution invalidated Georgia's well-established statute and caselaw mandating abuse-of-discretion review." *Id.* at 21-22 & n.20 (internal quotation marks omitted; ellipses in original). But the Georgia Supreme Court has held that appeals from *BMW* determinations are not within the scope of its exclusive jurisdiction.[13] Moreover, petitioners did not seek invalidation of any state statute: the statute in question, applicable to state-law excessiveness challenges, does not — and could not — dictate the standard of review applicable to *BMW* determinations. In any event, under Georgia law, an appeal to the wrong court results in a *transfer*, not a waiver.[14] Thus, in the end, respondents "wrong court" argument is simply a rehash of their mistaken claim that petitioners did not say enough to preserve the *Cooper* issue.

Finally, respondents contend (at 22-23) that petitioners forfeited the benefit of *Cooper* when their Court of Appeals brief said that the Court of Appeals "reviews for abuse of discretion rulings . . . for excessive damages." Br. in Opp. App. 16a. But that language referred to review of rulings on challenges to damages (punitive and compensatory) on state-law grounds. That is why petitioners cited *Lisle v. Willis*, 463 S.E.2d 108, 110 (Ga. 1995), which addressed the standard of review applicable to motions on state-law

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[13] *See General Motors Corp. v. Moseley*, No. S94A0122, Order (Ga. Jan. 5, 1994); *General Motors Corp. v. Moseley*, 447 S.E.2d 302 (Ga. Ct. App. 1994).

[14] *See, e.g., Atlanta Newspapers, Inc. v. Grimes*, 110 S.E.2d 343, 343 (Ga. 1959).

grounds. As already explained, *see supra*, p.8, petitioners also urged the Court of Appeals to "revie[w] *de novo* rulings on questions of law," Br. in Opp. App. 16a, which amply covered their request for review of the trial court's *BMW* determination. In sum, respondents' suggestion that petitioners invited error lacks merit.

CONCLUSION

The petition for a writ of certiorari should be granted.

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